

48A C.J.S. Judges § 339

Corpus Juris Secundum | August 2023 Update

Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

IX. Disqualification to Act

E. Effect of Disqualification of Judge

§ 339. Effect on official acts of disqualification—Acts as void or voidable

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

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Whether an act of a disqualified judge is void or voidable depends primarily on the language of the constitution or statute prescribing the disqualification; if the right to object to a disqualified judge is a personal privilege of the litigant, or if the disqualification may be waived, it has generally been held that the acts of a disqualified judge are merely voidable.

While the judicial act of a disqualified judge is an error subject to vacation or reversal, it has generally been held that at common law such act is merely voidable,¹ but not void,² and that such an error does not affect the judge's jurisdiction³ or render the acts subject to collateral attack.⁴ Since, however, the disqualifications of judges are mostly the creatures of statute or rule, whether the act of a disqualified judge under the provision declaring the judge disqualified is void or voidable depends on the language of the statute or rule or the nature of the disqualification thereunder.⁵

If the right to object to a disqualified judge is a personal privilege of the litigant, or the disqualification may be waived, it has generally been held that the judge's act is voidable but not void⁶ and that it is not subject to collateral attack.⁷ This rule has been applied in cases where the disqualification arose from interest,⁸ from relationship,⁹ from having been counsel,¹⁰ or from having presided at a former trial.¹¹

On the other hand, if the disqualification is of a nature that cannot be waived, or is considered as founded in public policy, the act of a disqualified judge is absolutely void.¹² This is also true where the constitution or statute creating the disqualification by mandatory provision prohibits the judge from acting¹³ although the mere existence of statutory grounds for recusal of a judge does not in and of itself void or nullify subsequent proceedings before that judge.¹⁴ Furthermore, where a motion for substitution of a judge is improperly denied, all subsequent action by the judge is void.¹⁵

If the act is considered void, it is subject to collateral attack.¹⁶ It is void notwithstanding an attempt to waive the disqualification¹⁷ or to confer jurisdiction by consent.¹⁸ If the disqualification appears on the record, and there is no waiver of such disqualification as required by statute, the acts of such disqualified judge are void.¹⁹ In applying these rules, the acts of a judge disqualified by interest,²⁰ by relationship to the parties,²¹ or by previously representing one of the parties²² have been held to be absolutely void.

Under some statutes, disqualification on the grounds of interest, relationship, or having acted as attorney, when established, voids all proceedings had before the judge,²³ while disqualification for bias or prejudice, when established, affects only future proceedings.²⁴ Also, it has been held that recusal of a trial judge, for reasons other than bias or prejudice regarding the parties in the case, does not invalidate earlier pretrial rulings of that trial judge.²⁵ Disqualification for interest also renders void acts of the judge with respect to parties who have not waived the objection although such acts are binding on parties who have waived the objection.²⁶

Ministerial acts.

A general rule that the acts of a disqualified judge are void may be subject to an exception for ministerial acts.²⁷ For instance, there is authority that where the trial judge orally announces a ruling, subsequently enters an order of recusal, and thereafter performs the ministerial act of simply entering a written order or judgment reflecting the prior oral ruling, the written order is not void.²⁸

Actions taken after improper denial of motion.

Where a petition for substitution of a judge is erroneously denied, all orders entered subsequent to the denial are null and void.²⁹ Where the trial judge should have been but was not disqualified, then all proceedings that occurred after the filing of the recusal motion are invalid and of no effect.³⁰

CUMULATIVE SUPPLEMENT

Cases:

Husband and wife's marital settlement agreement was tainted by disqualified temporary judge's void rulings in marriage dissolution proceeding, and was thus unenforceable; judge's rulings, which were almost all in husband's favor, and wife's perception that judge was biased against her indicated that rulings influenced parties' assessment of the strengths of their respective cases and therefore their willingness to accept terms of agreement, and enforcement of agreement that was influenced by void rulings of disqualified judge would both undermine policy of judicial disqualification and cast doubt on the impartiality of, and therefore public confidence in, the courts. *Cal. Const. art. 6, § 21; Cal. Civ. Proc. Code §§ 170.1(a), 664.6. Hayward v. Superior Court, 2 Cal. App. 5th 10, 206 Cal. Rptr. 3d 102 (1st Dist. 2016).*

Temporary restraining order that judge signed after receiving handwritten motion to recuse was void, even if motion did not comply with technical requirements for motion, where judge did not grant motion or refer motion to regional presiding judge, and judge did not conclude that good cause existed for him to rule on restraining order application before deciding to grant or refer motion to recuse. *Tex. R. Civ. P. 18a(f)(1), (2)(A). In re Marshall, 515 S.W.3d 420 (Tex. App. Houston 14th Dist. 2017).*

[END OF SUPPLEMENT]

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Footnotes

- 1 U.S.—*Ralph v. Brough*, 248 F. Supp. 334 (D. Md. 1965).

N.D.—*State ex rel. Johnson v. Thomson*, 76 N.D. 125, 34 N.W.2d 80 (1948).

Ohio—*State ex rel. Gomez v. Nau*, 2008-Ohio-5685, 2008 WL 4785618 (Ohio Ct. App. 7th Dist. Noble County 2008).
- 2 U.S.—*Ralph v. Brough*, 248 F. Supp. 334 (D. Md. 1965).

Ky.—*Dotson v. Burchett*, 301 Ky. 28, 190 S.W.2d 697, 162 A.L.R. 636 (1945).

N.D.—*State ex rel. Johnson v. Thomson*, 76 N.D. 125, 34 N.W.2d 80 (1948).
- 3 Ill.—*People v. Nickols*, 41 Ill. App. 3d 974, 354 N.E.2d 474 (3d Dist. 1976).

Ky.—*Dotson v. Burchett*, 301 Ky. 28, 190 S.W.2d 697, 162 A.L.R. 636 (1945).

N.D.—*State ex rel. Johnson v. Thomson*, 76 N.D. 125, 34 N.W.2d 80 (1948).

Loss of jurisdiction on establishment of disqualification, see § 335.
- 4 U.S.—*Owens v. Dancy*, 36 F.2d 882 (C.C.A. 10th Cir. 1929).

Fla.—*Dickinson v. Raichl*, 120 Fla. 907, 163 So. 217 (1935).

N.D.—*State ex rel. Johnson v. Thomson*, 76 N.D. 125, 34 N.W.2d 80 (1948).
- 5 Ariz.—*Conkling v. Crosby*, 29 Ariz. 60, 239 P. 506 (1925).

N.D.—*State ex rel. Johnson v. Thomson*, 76 N.D. 125, 34 N.W.2d 80 (1948).
- 6 Ind.—*Wilson v. State*, 521 N.E.2d 363 (Ind. Ct. App. 1988).
- 7 Ga.—*Wood v. Clarke*, 188 Ga. 697, 4 S.E.2d 659, 124 A.L.R. 1077 (1939).

N.D.—*State ex rel. Johnson v. Thomson*, 76 N.D. 125, 34 N.W.2d 80 (1948).
- 8 U.S.—*In re Fox West Coast Theatres*, 25 F. Supp. 250 (S.D. Cal. 1936), order aff'd, 88 F.2d 212 (C.C.A. 9th Cir. 1937).
- 9 N.M.—*Kavanaugh v. Delgado*, 1930-NMSC-066, 35 N.M. 141, 290 P. 798 (1930).
- 10 U.S.—*Borough of Hasbrouck Heights, N.J. v. Agrios*, 10 F. Supp. 371 (D.N.J. 1935).

Ga.—*Wood v. Clarke*, 188 Ga. 697, 4 S.E.2d 659, 124 A.L.R. 1077 (1939).
- 11 Conn.—*State v. Hartley*, 75 Conn. 104, 52 A. 615 (1902).
- 12 N.Y.—*Loeb v. Nassau Elec. R. Co.*, 240 A.D. 912, 267 N.Y.S. 839 (2d Dep't 1933).

N.D.—*State ex rel. Johnson v. Thomson*, 76 N.D. 125, 34 N.W.2d 80 (1948).

Judicial disqualification unwaivable

Tex.—*Kuykendall v. State*, 335 S.W.3d 429 (Tex. App. Beaumont 2011), petition for discretionary review refused, (Oct. 12, 2011) and application for writ of habeas corpus held in abeyance, 2013 WL 2146207 (Tex. Crim. App. 2013).

Bias against adoptive parents based on their sexual orientation

Ill.—*In re C.M.A.*, 306 Ill. App. 3d 1061, 239 Ill. Dec. 920, 715 N.E.2d 674 (1st Dist. 1999).

13 Fla.—*Davis v. State*, 849 So. 2d 1137 (Fla. 1st DCA 2003).

La.—*State v. Price*, 274 So. 2d 194 (La. 1973).

Tex.—*Freedom Communications, Inc. v. Coronado*, 372 S.W.3d 621 (Tex. 2012).

Statutory disqualification will deprive judge of jurisdiction

N.Y.—*People v. Alteri*, 47 A.D.3d 1070, 850 N.Y.S.2d 258 (3d Dep't 2008).

14 Tex.—*Randolph v. Texaco Exploration and Production, Inc.*, 319 S.W.3d 831 (Tex. App. El Paso 2010).

15 Ill.—*People v. Bell*, 276 Ill. App. 3d 939, 213 Ill. Dec. 351, 658 N.E.2d 1372 (2d Dist. 1995).

16 Mich.—*Horton v. Howard*, 79 Mich. 642, 44 N.W. 1112 (1890).

N.D.—*State ex rel. Johnson v. Thomson*, 76 N.D. 125, 34 N.W.2d 80 (1948).

Tex.—*Ex parte Washington*, 442 S.W.2d 391 (Tex. Crim. App. 1969).

17 Me.—*Blaisdell v. Inhabitants of Town of York*, 110 Me. 500, 87 A. 361 (1913).

Mont.—*In re Woodside-Florence Irr. Dist.*, 121 Mont. 346, 194 P.2d 241 (1948).

18 N.D.—*State ex rel. Johnson v. Thomson*, 76 N.D. 125, 34 N.W.2d 80 (1948).

Tex.—*Woodland v. State*, 147 Tex. Crim. 84, 178 S.W.2d 528 (1944).

19 Neb.—*Harrington v. Hayes County*, 81 Neb. 231, 115 N.W. 773 (1908).

20 Mont.—*Gaer v. Bank of Baker*, 111 Mont. 204, 107 P.2d 877 (1940).

N.Y.—*Casterella v. Casterella*, 65 A.D.2d 614, 409 N.Y.S.2d 548 (2d Dep't 1978).

21 Nev.—*Hoff v. Eighth Judicial Dist. Court In and For Clark County*, 79 Nev. 108, 378 P.2d 977 (1963).

Tex.—*Ex parte Vivier*, 699 S.W.2d 862 (Tex. Crim. App. 1985).

22 N.J.—*Rivers v. Cox-Rivers*, 346 N.J. Super. 418, 788 A.2d 320 (App. Div. 2002).

23 Cal.—*Woolley v. Superior Court of Stanislaus County*, 19 Cal. App. 2d 611, 66 P.2d 680 (3d Dist. 1937) (rejected on other grounds by, *In re Henry C.*, 161 Cal. App. 3d 646, 207 Cal. Rptr. 751 (5th Dist. 1984)).

24 Cal.—*Turkington v. Municipal Court of City and County of San Francisco*, 85 Cal. App. 2d 631, 193 P.2d 795 (1st Dist. 1948).

25 Ga.—*Wise v. State*, 257 Ga. App. 211, 570 S.E.2d 656 (2002).

26 Ga.—*Howard v. Warren*, 206 Ga. 838, 59 S.E.2d 503 (1950).

S.C.—*Lide v. Fidelity & Deposit Co. of Maryland*, 179 S.C. 161, 183 S.E. 771 (1936).

- 27 Fla.—*Parnell v. Parnell*, 113 So. 3d 989 (Fla. 5th DCA 2013).
- Tex.—*Fuelberg v. State*, 410 S.W.3d 498 (Tex. App. Austin 2013).
- 28 Neb.—*In re Trust by Crawford*, 20 Neb. App. 502, 826 N.W.2d 284 (2013).
- 29 Ill.—*Shachter v. City of Chicago*, 2011 IL App (1st) 103582, 356 Ill. Dec. 901, 962 N.E.2d 586 (App. Ct. 1st Dist. 2011), appeal denied, 360 Ill. Dec. 9, 968 N.E.2d 88 (Ill. 2012).
- 30 Ga.—*Propst v. Morgan*, 288 Ga. 862, 708 S.E.2d 291 (2011).

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